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Final Report - Dissent by International Commissioners

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FOR IMMEDIATE RELEASE

STATEMENT BY TJRC COMMISSIONERS CHAWATAMA, DINKA, AND SLYE

We are shocked and saddened by the recent turn of events. We were given less than two hours notice of the handing over of the Final Report to the President on Tuesday, 21 May – a product that resulted from a process that we have devoted four long, and hard, years of our lives. Only one of us was therefore able to attend the handover.

When we received the notice, we asked whether the version of the Final Report that was to be presented to the President included our dissent, which we reproduce below. Under the Procedures of the Commission agreed to by all Commissioners in writing in Naivasha on 16 April (see attached), any Commissioner has the right to dissent within forty-eight hours of having sight of the final draft of a chapter. On Friday, 17 May, we were informed that the final draft of the land Chapter in the Report would include changes that were decided after the end of our operational period (3 May 2013) and that were motivated in part by the Office of the President. (See our dissent below for the history of these changes.) On that same day (17 May) all three of us indicated by email our intention to exercise our right under our Procedures to dissent. We requested that the printing and binding of the now-revised Report be halted so that our dissent could be included in this new version of the Final Report, again as set forth in our Procedures. As we set forth in our dissent below, we stand behind all parts of the Final Report other than those paragraphs in the land Chapter that we discuss below.

We later learned that not only was the printer not instructed to hold off the final printing so as to include our dissent, they were in fact instructed by a senior Commission official to produce a Final Report with the contested changes and without our dissent, contrary to the clear requirements of our own Procedures.

Over the weekend we were informed that a majority of Commissioners had voted to exclude our dissent from the Final Report. Again, this was clearly contrary to the Procedures agreed to by all Commissioners. A dissent by its very nature does not require the consent of the majority; otherwise it would not be a dissent. We later received indications that one, and perhaps more, Commissioners who were claimed to be a part of that majority had in fact not been consulted, much less expressed their consent, to this course of action.

What has been handed over to the President, therefore, is an incomplete Report. The changes in the land Chapter are in fact part of the Report (though as we note below they were made after the end of our operational period, and were subject to other irregularities that may make them open to

challenge). The majority voted to make those changes, and we do not here challenge the validity of that decision. The Report handed over to the President is incomplete, however, because it does not include our dissent.

We are very sorry that what was a difficult but important process has ended in such an untidy way. As we set out below in our dissent, we tried mightily to reach a consensus with our fellow Commissioners so that we could stand united behind this Report. Alas, we failed at that. We recognize the irony of a Commission dedicated to truth, justice, and reconciliation suppressing the voice of a minority in clear violation of our agreed upon procedures.

We want to reiterate that we stand by our Final Report as it was produced on 3 May 2013. The changes we indicate below – as well as any other changes that may come to light that are at variance with that 3 May version – we do not endorse.

We decided not to release this dissent until now for one fundamental reason. The Final Report, and all of the work that went into it, is an excellent piece of work. It contains detailed discussion and analysis of some of the most important historical injustices within our mandate period. It has far-reaching findings, and bold recommendations. Upon its release on 22 May, it has been the subject of a national discussion about those historical injustices and the way forward. We did not want to distract from the important process of reading, and understanding, the full import of this Report. Had we released the dissent immediately, we were afraid that it would have overshadowed, or at least diminished, the coverage of the overwhelming majority of the Final Report behind which we stand. Yet we also feel strongly that this dissent should be, and in our view is, a part of this Report. It is a sad chapter in what had always been a challenging process, but it is a chapter that needs to be told.

**DISSENTING OPINION WITH RESPECT TO CHAPTER 2 OF VOLUME 2B OF THE FINAL REPORT OF THE
TRUTH JUSTICE AND RECONCILIATION COMMISSION OF KENYA**

**Judge Gertrude Chawatama
Ambassador Berhanu Dinka
Professor Ronald C. Slye**

With much regret, and after many tireless days of trying to reach a reasonable compromise, we are obligated by our conscience and the oath that we took when we joined this Commission, to dissent completely from the amendments made after 3 May 2013 to this chapter in this Volume devoted to Land – Chapter 2 of this Volume 2B.

We want to make clear that our decision with respect to the Land chapter does not and should not be taken to suggest that we have any concerns about the rest of the Report. We not only stand behind those other chapters, we are distinctly proud to have been a part of their creation, and to have contributed to all of the hard work over the last four years that culminated in this Report.

We have enjoyed immensely the work we have done in this country, and value the productive working relationship we were able to develop with our Kenyan colleagues. We came here with the understanding that our role was to provide a more objective, and international, perspective to the work of the Commission. We do not claim to be completely objective (no one of us can be), but we do approach the history of Kenya with fresh eyes, and with a commitment to the integrity of the process, and the people of Kenya, foremost in our mind. All that we have been through as a Commission in the last four years makes it particularly difficult for us to lodge this dissent. We tried as hard as we knew how to reach a compromise that was consistent with the integrity of the process, the testimony of our witnesses, and our own integrity and oath of office. We ultimately failed.

We set out here the reasons for our dissent, and the concerns we have with respect to the Land chapter. We are, perhaps understandably, hesitant to name names with respect to the facts we provide here. We are aware that some of the Kenyan staff and Commissioners have been placed under enormous pressure in the last few weeks related to the events we recount here.

The Land chapter was approved, signed, and submitted to the printer for publishing prior to the end of our operational period on 3 May 2013. It had been unanimously approved by all Commissioners, and was transmitted to the publisher in order to be printed and bound with the rest of the Report. At that time, there was one Commissioner who had raised some concerns about the chapter. There was a discussion about these concerns that concluded with the possibility of that Commissioner drafting a dissent. No such dissent was ever submitted to the Commission. Around this same time, a copy of the Land chapter appears to have been leaked to individuals with ties to State House.

Shortly after this, the Commission was told that in order for us to hand in the Report, we needed to provide an advance copy to the Ministry of Justice and to the Office of the President. The reason, we were told at the time, was that officials in those offices needed to prepare a summary of the Report to brief the President so that, when we handed over the Report, he would have already been able to familiarize himself with its contents. Initially, the Commission resisted this request. After numerous discussions both internally and with those offices, and after we were told that the Report would not be received unless this “normal procedure” was followed, we agreed to provide a copy of the executive summary of the Report to the offices of the Attorney General and to the Office of the President. After this concession was made we were still told that an advance copy of the entire Report was required. With much regret, and with the abstention of two of the international Commissioners, it was agreed to give an advance draft of the Final Report to the Office of the President.

Shortly after the apparent leak of the Land chapter, and the handing over of an advanced copy to the Office of the President, the position of some of the Kenyan Commissioners began to shift. One Commissioner who had been the first to approve the Land chapter, and who stated that it was “excellent and not a comma should be touched,” and who vigorously opposed the suggestions of the other Commissioner who was contemplating a dissent, began to argue forcefully and consistently for major revisions to the Land chapter. These revisions involved the removal of entire paragraphs of the chapter, and significant revisions of other paragraphs.

It was at this time that a number of Commissioners, including at least one of the international Commissioners, received phone calls from a senior official in the Office of the President suggesting various changes to the Land chapter. These suggestions included the removal of specific paragraphs.

Some of the Commissioners who now demanded changes to the Chapter began to exert enormous pressure on staff and others related to the production of the Report. This included demanding that changes be made without any consultation, much less consent, from other Commissioners. At one point it was asserted that five Commissioners approved changing the Land chapter. When two of those individuals were contacted, they clearly stated that they had never consented to such changes – and in fact later those same Commissioners were to put their position against such changes in writing. Even if five Commissioners had approved of such changes, the three international Commissioners (and perhaps others) were never consulted; no meeting was called; and thus the procedures by which the Commission is to make decisions were blatantly ignored. The myth of five Commissioners agreeing to changes in the land chapter at this point even manifested itself in a formal letter written by the Chair to our Director of Research, purporting to authorize the changes to the Land chapter based upon a majority of five votes.

And yet at least one of these written statements expressing opposition to any changes in the report evaporated in a scant twenty-four hours, also in writing and after, we are told, direct intervention by senior officials in the Office of the President. In a matter of days, five Commissioners appeared united concerning changes to the Land chapter. The five included our Chair, who under the terms of the Aide Memoire that we had reached with him in connection with his return to the Commission in early 2012, was precluded from having any involvement in the drafting of the Land chapter. (See the Challenges chapter in Volume 1 for a discussion of the events leading up to the Aide Memoire, and Appendix 10 of that same Volume 1 for the full text of the Aide Memoire.) The other Commissioners appeared to have no concerns about this involvement of the Chair with respect to a chapter in which we had all consistently agreed he had a conflict of interest.

Meanwhile, we were told that the President's schedule was so tight that he did not have time to receive the Report. Concerned that our failure to hand over the Report by the end of our operational period (3 May 2013) might constitute a violation of the TJR Act, we requested a legal opinion from the Attorney General regarding the legal status of the Report if it were submitted to the President after 3 May 2013. In a seven page response to the Commission, the AG concluded as follows:

Accordingly, I am of the considered view that the Commission may legitimately present its report to the President even after the end of its operations. The only duty that the Commission ought to observe is *that the report ought to be presented without undue delay*. (Our emphasis)

As the tensions built about whether, and if so how, to change provisions of the Land chapter, time ticked away. Initially we were comfortable with the delay. The President was in fact out of the country much of the time immediately after we were ready to hand over the Report. But as one week became two, and as it appeared that an appointment would not be provided unless and until we agreed to significant changes in the Land chapter, we began to worry that we were skirting violation of the TJR Act by failing

to present our Report “without undue delay,” in the words of the Attorney General, and thus risking the possibility of the entire Report being suspect by virtue of its being handed over after the end of our operational period.

In an effort to seek a compromise that would preserve the integrity of the Report and the integrity of the individual Commissioners, the three international Commissioners discussed the paragraphs that some wanted removed or changed, and suggested a compromise. The compromise consisted of making clear in the body of the text that the information contained therein was provided by a witness who testified under oath to the Commission, to thus dispel the possibility that someone might think that by repeating what someone else had said the Commission was concluding that their assertions were true. This is of course a truism that applies to the entire Report. One of our tasks was to provide a narrative of historical injustices that included the perspectives of victims, perpetrators, and others. It is in our findings, which are collected in Volume 4 of the Report, where one may find conclusions of fact that the Commission found as true, based on evidence we collected and evaluated under a balance of the probabilities test (the standard of proof adopted by all truth commissions and by most courts of law in arriving at a civil judgment).

While it appeared that this compromise was appealing to some of the Kenyan Commissioners, ultimately it was rejected. The position of the majority remained that specific sentences needed to be removed from the chapter. Some of these sentences were based upon direct testimony made by witnesses before the Commission under oath. We could not in good conscience agree to the removal of these voices, particularly when such removal was so clearly motivated by political pressure from high government officials.

We want to be clear that by demanding that the content of the original paragraphs not be altered substantially, we do not in any way assert that the content of those paragraphs is in fact true. Rather, we do assert that the content of those original paragraphs accurately reflects the testimony provided to the Commission. It is our understanding that the information provided in those paragraphs is not new, though some may question its truthfulness. It is unfortunate in our view that the political pressure that was brought to bear ostensibly to protect the reputation of the first President, will probably have the opposite effect of tarnishing that legacy. As reflected in other parts of this Report, President Jomo Kenyatta was a hero during the anti-colonial struggle, and accomplished many great things during his long Presidency. He also was involved in, or led a government that was responsible for, a wide variety of historical injustices. In this regard, he is no different than the other two Presidents whose governments were the subject of our inquiries.

We are careful in this Report not to label an individual as “good” or “bad.” People do good things, and people do bad things. An individual whom some may view as good, will almost certainly have made some mistakes. And a person whom some may view as bad, will also have done some good things in his or her life. This is more so for any elected leader, not only in Africa but throughout the world. No government leader is perfect, and we do ourselves a disservice by demanding perfection of our leaders. Rather, we should demand transparency, honesty, and accountability, both from our governments generally and our leaders individually.

Finally, we should also make clear that while the events that led us to dissent touch upon statements of witnesses regarding the first President of the Republic, we do not mean to imply in any way – and in fact we have not a single piece of evidence supporting such an assertion –that the current President knew about any of the events described by these witnesses, much less that he is in any way responsible for them. We also want to make clear that we have no information with respect to whether the current President was aware of, or condoned, the actions of officials in the Office of the President that we describe above. Needless to say, the same is true for the Deputy President.

In the interest of transparency and truth, we here reproduce the original paragraphs (including the original footnotes), unanimously approved by all Commissioners, and as they were to appear in the Land chapter of the Report prior to the recent changes. These paragraphs in their original form, and then in their revised form, were emailed to all Commissioners by the CEO on 17 May 2013. It is our recollection that they accurately reflect the original paragraphs that we had approved before the end of our operational period, 3 May 2013, and prior to the push for changes. Again, we want to emphasize that we do not in any way assert that the content of these paragraphs reflects the truth. We do, however, insist that they do accurately reflect the testimony and other information provided to the Commission. Nevertheless, the following paragraphs from the Land chapter in the unanimously approved and signed Report have been changed after the end of the Commission’s operational period on 3 May 2013:

203. In addition, there were peculiar cases of land grabbing and related malpractices during Kenyatta’s administration which serve to illustrate how deeply the problem of land grabbing had cut into Kenya and the wanton manner in which key government officials, including the president grabbed what should have been public or communal land and “dished” it to relatives. A case in point involves the president himself. When Kenyatta’s son, Muigai, married Isaiah Mathenge’s daughter in 1976, Kenyatta’s wedding gift was a large tract of government land which was, apparently, acquired without official approval and without compliance with legal procedures.¹

227. The foregoing statement discloses the potential danger of violent conflicts by Kenyans whose government has not only committed atrocities against, but has also failed over the years to recognize their plight and redress them. In light of secessionist movement inclinations manifested by the MRC at the Coast, any honest view that a community in Kenya would be better off with colonialists should be carefully addressed to avert the possibility of more secessionist movements that may be facilitated by the current establishment of regional governments across the country.

231. Apparently over time, especially between 1996 and 2003, the Criticos family offered a substantial proportion of the 30 000 acres of land to the government for purchase at low rate of only KSh600 per acre to settle landless squatters. However, after acquiring the land, the government, in its usual style of irregularity, began to settle people from upcountry, especially

¹ See Hornsby, Charles, Kenya: A History since Independence, p.314.

the Kamba and not the coastal communities that the land was meant for.²⁰⁴ The Criticos family further offered to sell land at concessionary rates to landless communities from the Coast and from upcountry, including those from Nyanza who had settled on the land as farm workers but the family's efforts were thwarted by the government which, through the provincial administration, forcibly evicted the Criticos family from the whole parcel of land and began to irregularly settle people on it.²⁰⁵ By 2008, the Criticos family's efforts to give up a large portion of the land for re-settlement of the landless appears to have been completely disrupted, to a halt, as a result of illegal dealings with the land on orders of the then President, supplemented by support of the local MP and the Ministry of Lands and Settlement.²⁰⁶

257. However, after Kenya attained independence, in 1972, President Kenyatta unlawfully alienated to himself 250 acres of the land, especially portions on the beach.²⁴⁰ He also allocated part of the land to his friends, relatives and other associates.²⁴¹ He directed residents that whatever was left of the trust lands would be established as settlement schemes for their benefit. However, without following due procedures of law, he again took part of whatever remained for himself and his relatives. He also demanded that local communities that should have benefited from the trust lands accept payment of KSh600 per acre. When the locals declined to accept the money, he told them that whether or not they accepted it, the remainder of the trust lands would go to the government.²⁴² That is how irregularly President Kenyatta took all of Tiwi and Diani trust lands at the expense of local people who immediately became 'squatters' on the land and were subsequently evicted, rendering them landless and poor. By 2012, land in the former trust lands fetched KSh15 million per acre.

261. Since Kenyatta's administration, settlement schemes at the Coast have been fraught with irregularities, outright discrimination of landless coastal communities, settlement of mainly one upcountry community on coastal communities' lands, land grabbing by high and low-ranking government officials and fraud. It emerges that the real intention of settlement schemes at the Coast, especially in the period immediately after independence, was to settle mainly the Kikuyu tribe on ancestral lands of coastal communities. As a result, many members of coastal communities who lost their land during colonialism remain landless, poor and, in many cases, destitute, their means of livelihood having been forcefully taken away, as described below.

²⁰⁴ Letter from Hon. Basil Criticos dated 25th November 2011, at pages 1- 3 (Copy with the TJRC).

²⁰⁵ Letter from Hon. Basil Criticos dated 25th November 2011, at pages 2 & 3 (Copy with the TJRC).

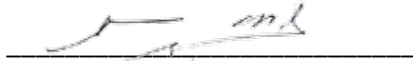
²⁰⁶ See, page 3 of Letter from Hon. Basil Criticos dated 25th November 2011(Copy with the TJRC).

²⁴⁰ Testimony of Mr Salim Ali Toza, Oral submissions made to the truth, justice and reconciliation commission held on Monday 23rd January, 2012, at the Kwale County Council Hall, at 37.

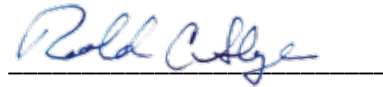
²⁴¹ Testimony of Mr Salim Ali Toza, Oral submissions made to the truth, justice and reconciliation commission held on Monday 23rd January, 2012, at the Kwale County Council Hall, at 37-38.

²⁴² Testimony of Mr Salim Ali Toza, Oral submissions made to the truth, justice and reconciliation commission held on Monday 23rd January, 2012, at the Kwale County Council Hall, at 38.

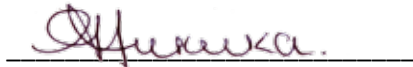
We provide this information, and this dissent, in the spirit of truth, justice and reconciliation for the people of Kenya and consistent with the letter and spirit of the TJR Act, and the oath of office we swore before the Chief Justice.



Amb. Berhanu Dinka



Prof. Ronald C. Slye



Judge Gertrude Chawatama